

LAKES MANAGEMENT ADVISORY COMMITTEE
NH Lakes Management and Protection Program



New Hampshire Department of Environmental Services
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MEETING MINUTES
April 27, 2007
DES Conference Room
9:30 a.m. - 1:00 p.m.

Members present:

Jim Haney, Ph.D., Chair
Jennifer Czysz
Mark Hemmerlein
Mitchell E. Kalter
Johanna Lyons
Fred Murphy
Larry Sunderland
Rich Tichko
Ken P. Wilson

Representing:

Scientific Community, UNH
Office of Energy & Planning
Commissioner, DOT
NH Fish & Game Commission
Commissioner, DRED
Planning Board
Conservation Community
Exec. Dir., Fish & Game Dept.
NH Marine Dealers Association

Term:

August 22, 2007
Indefinite
Indefinite
August 22, 2009
Indefinite
August 1, 2008
September 19, 2007
Indefinite
August 22, 2008

Members not present:

Wendell Berry
Mark Gallagher
Marsha LaVallee Huntoon
Ken Jordan
James S. Morash, Vice Chair
Phil O'Brien
Michele L. Tremblay
Vacant
Vacant

NH Business and Industry Assn
Commissioner, DOS
Conservation Commissions
NH Association of Realtors
Tourism Industry
NH Lakes Association
State Conservation Committee
Elected Municipal Official
Commissioner, Dept. of Agr., Markets & Food

July 8, 2007
Indefinite
August 22, 2007
June 27, 2008
August 1, 2007
August 1, 2009
August 1, 2009
Expired
Indefinite

Staff Present

Jacquie Colburn	Lakes Coordinator, Watershed Management Bureau (WMB)
Laura Weit	Asst. Planner, WMB
Jody Connor	Director, Limnology Center, WMB
Darlene Forst	Shoreline Section Supervisor, Wetlands Bureau
Paul Currier	Administrator, WMB
Paul Susca	Water Supply Protection
Carolyn Guerdet	Admin. Asst., Water Division
Andy Chapman	Clean Lakes Program Coordinator, WMB
Jim Gallagher	Administrator, Dam Bureau

Guests

Allen Brooks Assistant Attorney General, Dept. of Justice

The Meeting Was Called to Order

Jim Haney, Chair, called the meeting to order at 9:35 a.m.

I. Introductions/Minutes/Committee Business

1) As there was no quorum the minutes were not voted on. There were no corrections to the minutes.
Jacquie apologized that a Letter of Testimony was not written for HB505.

2) Committee Business:

Bud Berry's term will expire in July. Jim Haney's and Jim Morash's terms will expire in August and all need to start the reappointment process if they wish to continue to serve on the LMAC.

Jacquie reported that the House Finance Committee has recommended reinstating \$18,000 of the \$26,000 that had been removed in class 50 account which pays for interns and part-time staff of the LMPP and the RMPP. The budget has gone to the Senate. If the \$18,000 stays, then a part-time planner could be hired but not the interns. The LMAC decided to send a letter to Senate Finance to request that the full \$26,000 be put back into the LMPP and RMPP budget.

3) Next meeting will be May 18, 2007.

4) Future Agenda Items:

- a. Public Trust – Allen Brooks is to arrive at 10 AM today for discussion.
- b. Sustainability Initiative – to be discussed later on under that portion of the agenda.
- c. Water Quality Standards Advisory Committee Update – this group is looking at the existing water quality standards in the State and is developing recommendations for the administrative rules. Paul Currier and Andy Chapman will give a joint presentation regarding: 1) the work of the WQSAC, and 2) watershed modeling – using AVGWLF, later today.
- d. Study of the Economic Value of NH Lakes, Rivers, Streams, and Ponds – Anne Nordstrom will give a presentation to the Committee at the May 18th meeting. This encapsulates the work that was done for the 4th and final phase of this study.
- e. Lake Visits – Possible visit to Umbagog, which is the very first waterbody the LMAC visited back in 1992. If a proposed marina is approved in Upton Maine, there will be more boating on the lake, possibly changing the character of the lake. Johanna L. suggested that Ossipee Lake be added to the list for visiting.
- f. Global Lake Ecological Observatory Network (GLEON) Program - Phil O. suggested a report be given on this sometime in the fall. Jim Haney shared that an automated, underwater vehicle will be tried out in NH in July that has a complete set of probes for testing and data gathering. This will be helpful in mapping cyanobacteria blooms.

5) State Agency/Member Updates:

Johanna/DRED: The Division of Parks and Recreation is launching “The Great Park Pursuit”, May 19th – June 23rd. For families to take part in this clue-based game there will be three guided events and three self-guided events. The kick-off will be May 19th at Bear Brook State Park. This is a regional initiative with MA, CT, and NH fully participating and VT doing some events. The hope is to add ME and RI next year for a New England wide event.

The Department is going to hold a public information session Saturday, May 5th, from 9-12 about the Ossipee Lake natural area. This is to help develop some management strategies for this area.

Jacquie/DES: Jacquie noted that Laura W. and Laura H. have revised the fact sheet for the Lakes Management Protection Program and it is now on the web. Jacquie thanked those that responded to the request for ideas and suggestions.

There was no Earth Day event as the Governor was not available. They will continue to discuss a possible time for the Governor to get out on one of the lakes this summer.

Discussion of Public Trust

Jacquie referred to the email she sent to Allen which included a summary of the primary concerns the committee has and some of the discussions from last month's LMAC meeting.

Allen said that he wanted to meet with the committee because we know that requesting a formal opinion can take a long time. He was there representing only one perspective from the Attorney General's office, which did not constitute the opinion of the AG's office. He was here to frame the questions that the LMAC is asking, and to understand our concerns in order to move forward in the most efficient way.

Fred noted there is no concrete definition for public trust. The LMAC is working to protect the public waters of the state for everyone's use. We are addressing carrying capacity.

Allen said the determination for public trust is a case-by-case analysis as the court needs to look at the facts and the use. The framework is defined in the law. The list that has been provided by the court is fishing, skating, commercial boating, etc., but it is not exhaustive. It is subject to: 1) reasonable use and 2) the normal police power that the agencies get their authority from for health, safety, and welfare. Public trust is kind of a property type description, subject to regulation and rules of reasonableness.

Since Mark G. was unable to attend, Rich T. shared Mark G's. issues - there is no common understanding between agencies. If the state holds the waterbodies in trust, what about swim lines, rafts, etc. in the water. These take some of the public trust and create a private institution for private enjoyment. It gets down to resource allocation – how much of the public trust does the state claim? Then, how much of the public trust does the public, at large, get to enjoy? There is also the leasing issue of state-owned land to be used privately. As the Attorney General's office is the entity which holds the public trust, and determines what those public trust issues are, until there is a common understanding which directs this umbrella and all state agencies have a basic framework of understanding, the charge of carrying capacity we have cannot be fulfilled. When is enough, enough?

Rich's perspective is that the Fish & Game Public Access program is not to maximize the surface acres of the waterbody for recreational uses. It is determining that the public has a right to optimum use.

Darlene Forst noted that in permitting for wetlands the point has been reached for the "right-to-wharf". In wetlands permitting, is it appropriate to require shorefront owners to adapt their usage to the waterbody they are on and the characteristics of the waterbody immediate to their location, or is wetlands required to modify the public trust to suit the uses that the public wants? Allen B. stated it sounds like accommodating someone's right to wharf-out for use, but putting restrictions or limitations on how this is done. An example is dredging out to accommodate a larger boat. Why should an individual have a right to modify a public trust to suit their wants rather than suit their usage to what exists? It's a question of changing the resource. Another common request is removal of weeds. The true public trust issue is the modification of the waterbody because it doesn't suit what "I" the homeowner want.

Allen B. stated it is an overlap of public trust and a regulatory framework, and how do you do both of those things? The "right to wharf-out" phrase is usually followed by "subject to reasonable restrictions placed on it by the state". Public trust right cannot override regulations.

The public trust is not an overarching umbrella; there are a lot of shades of gray, since it leaves room for interpretation. What the public trust will do is provide the end points – the right you have and what you cannot do. Agencies will have to compare what their statutes say, where they overlap, and then exercise the rights in some sort of balance.

Paul C. noted there is regulatory context to make those decisions in the Water Quality Standards.

Darlene noted an escalation in projects that affect wetlands associated with surface waters. There is also a large push in the southern half of the state for native aquatic weed removal. The public perception is that any individual has the right to modify a waterbody to suit their wants and desires. There is no definitive line to say no.

Rich asked where does the state, the holder of the trust, the Attorney General's office being the interpreter and guardian of that trust, limit where can you develop. The macro must be looked at because much is not for the greater good.

Paul C. commented that the legislative process develops a series of restrictions intended to manage the public trust waters. It's an integrated, evolving, social, and political process that defines this. Allen pointed out that public trust does have end points. There is the environment base and the public vs. private ownership property right base.

Mark H. brought up state agency use and asked how the doctrine changes when multiple users are involved? Also he asked about the public trust being beyond the edge of the lake. Allen stated the boundary of the public trust authority in New Hampshire doesn't reach into the upland watershed areas.

There are other regulations that provide restrictions. When a public entity proposes to do a project that it is more consistent with public trust it is serving a public purpose.

Jim H. said that conceptually the public trust is protecting this resource, but it can't be used to justify particular restrictions. A classification of lakes could allow the setting up of regulations that could be justified because of this classification system. Make sure what you are doing is justifiable in terms of the regulations, but also include the reasons that it is being done.

Allen said the boundaries of the public trust provide some guidance and our analysis should include what you are permitting is consistent or inconsistent with those boundaries of public trust. Look at it as two separate and distinct types of things that you are doing: 1) regulation – police power, statutes, and agency programs that we have, and 2) public trust right for any individual is not unlimited; it is bound by reasonableness and what diminishes the use in general. These are issues of equal protection, takings (a broad concept), and whether the regulatory framework is properly functioning or not.

Paul stated that relative to a carrying capacity analysis, that kind of analysis would be a useful basis to feed into decision making about regulatory frameworks that might plug into situations.

Jacque thanked Allen for taking the time to discuss this with the committee and asked him if he would be willing to meet again with the committee as it moves forward with a carry capacity analysis. Allen said that he would be happy to work the LMAC. The committee hopes to use some models to arrive at some recommended management techniques for carrying capacity.

II. **Strategic Plan/"Sustainability Initiative" Subcommittee Update**

- 1) Presentation: Water Quality Standards Advisory Committee Update – Paul Currier
AVGWLF – Application to Perkins Pond – Andy Chapman (See combined PowerPoint presentation).
Jacque suggested that we ask Lori Siegel to do a Systems Dynamic Model on Perkins Pond. It would be good to see that model applied as well. The different models could be compared and put together.
- 2) Watershed Initiative – Review and discussion of:
 - a) White Paper (Justification Paper)
 - b) *Summary of Progress and Recommended Next Steps*
 - c) *Resolution to Establish a Watershed Sustainability Initiative*

The handouts included "*Summary of Progress and Recommended Next Steps*" and "*Resolution to Establish a Watershed Sustainability Initiative*". The subcommittee will meet again to revise and work on the Justification Paper before bringing it to the full committee for concurrence.

- b) *Summary of Progress and Recommended Next Steps*
This has been reviewed by the RMAC. At the April 19, 2007 RMAC meeting they voted in favor of what was suggested. Sarah Pillsbury and Paul Susca attended the subcommittee meeting on April 13th and described an effort that is currently underway - the development of a State Water Plan. There is cross-over between the state water plan and our sustainability initiative. The state water plan comes with money. It was recommended that the LMAC approve the *Summary of Progress and Recommended Next Steps*, however due to a lack of a quorum, this did not occur.
- c) *Resolution to Establish a Watershed Initiative*
The draft Resolution has not been seen by the RMAC, but the deadline to the Commissioner for the Resolution is July. See "Summary of Progress" for steps to be done. Steve Couture is searching for grant money. As the RMAC doesn't meet until June we not need to decide on this now. Staff will make contributions to this; the amount of staff time that will be invested has yet to be determined.

We do need concurrence with the RMAC and the LMAC before we take the Resolution to the Commissioner. A vote is needed before we move forward with Phase I of this effort. Phase I looks at watershed development, particularly loading and impacts to the water body; Phase II, is the carrying capacity element.

Paul pointed out the state-wide Water Plan is really focusing on water availability for public uses.

Fred noted we need to figure out what we want from the Sustainability Initiative. He does not see how rivers fit into this initiative. Jackie noted rivers fit into the big picture, when looking at the watershed. When we get into Phase II the information relative to rivers versus lakes will be developed. The RMAC is looking at the Water Quality Standards and are trying to determine what base parameter should be used to measure and thus regulate for. The in-stream flow analysis is required as part of the RMPP statute. Lakes will need to analyze carrying capacity. The Systems Dynamics model could be applied to Perkins Pond to see if this could be used to determine carrying capacity.

Larry S. summarized that Phase I deals only with water quality. Any other issues, recreation, etc. are in Phase II.

Jacque will send out the Summary of Progress and Recommended Next Steps document for approval by email to vote on agreement for getting the Sustainability Initiative underway.

III. Status Report – State of Our Dams – Jim Gallagher

Jacque asked Jim Gallagher to provide an update to the Committee on the status of the dams throughout the state. Jim stated Lake Francis is already full and there is much snow left to melt. The Androscoggin River has very high flows.

With the recent floods, the Dam Bureau staff has put in many, many hours in Milton, Rochester, and other parts of the state. There are three operators that go around to most the dams in the state and they have put in many hours monitoring and taking care of the dams.

There will be a study of management plans, how dams are managed, and the conditions that led to the recent floods. The Governor is very concerned and has asked for an outside investigation of the flooding situation. We've had two 100-year events in New Hampshire within the past year. The previous record floods were in 1936 and 1938 due to snow melt and the hurricane of '38.

IV. Legislation

Tuesday, May 1, 2007 is the Senate hearing date for HB 710 as well as CSPA bills 663, 665, and 857. The LMAC will send letters to the Senate in support of these bills. Larry Sunderland volunteered to testify for HB 710. HB 722 and 383 don't have hearing dates at this time. Letters of testimony will be prepared for both for committee concurrence. Derek D. provided a colored handout in reference to the bills for the LMAC.

Darlene Forst then reviewed the CSPA bills with the committee:

HB 665 – the staffing provision is now to be funded by a permit requirement. The only change is the removal of the provision to allow the Department to permit boat ramps in public roads. This could be changed again. The letter of testimony will ask to put that provision back in.

HB 663 – has gone from a direct appropriation to a permit for any dredge, fill or construction of structures within 250 ft. of a protected surface water. There is more definition of standards in this bill.

This will offer better enforcement and education. This should be a self-funded program. The Department is in support of this. HB 663 must pass to support HB 665.

HB 857 – existing permitting requirements. Offers more clarity and authority statements.

HB 383 – does not rely on HB 663. It changes the woodland buffer standard.

The Comprehensive Lake Inventory will be presented at the next meeting.

A CORD surplus land review was received April 26, 2007, Laura reviewed the application and it was not within the jurisdiction of the LMAC.

IV. Other Items and/or Issues

1) To do assignments:

- Subcommittee to review and rework the Resolution
- Subcommittee to look at the Justification Paper again
- Summary of Progress to be mailed out for email vote
- Letters to the NH Legislature: Testimony for HB 710, HB 665, HB 663 and HB 857 and the letter to Senate Finance regarding the LMPP and the RMPP budget.

Meeting was adjourned at 1:20 pm.